Supreme Court, U.S.
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No. 96-542

In The

Supreme Court of the United States

October Term, 1996

WALTER MCMILLIAN,

Petitioner,

v.

MONROE COUNTY, ALABAMA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY BRIEF FOR PETITIONER

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I. CONTRARY TO THE RESPONDENT'S MISTAKEN VIEW, *MONELL* DOES NOT RESTRICT MUNICIPAL LIABILITY TO ONLY THE ACTIONS OF LOCAL LEGISLATIVE BODIES AND DOES NOT PRECLUDE COUNTY LIABILITY FOR AN ALABAMA COUNTY SHERIFF'S UNCONSTITUTIONAL POLICIES IN THE AREA OF LAW ENFORCEMENT.

The whole of respondent's argument is premised on the mistaken view that only a single legislative municipal body can incur liability for a municipality. Under the respondent's theory, an unconstitutional policy implemented by a county official with final policymaking authority does not trigger county liability under § 1983 unless that county official's authority emanates from or is controlled by the county commission, as distinct from the county. The respondent thus argues that there is no county liability in this case because Monroe County Sheriff Tate's "authority over law enforcement does not emanate from the county commission and cannot be withdrawn by the county commission." Resp. Br. 6.

The respondent's argument does not turn on Alabama law but on an incorrect view of municipal liability under *Monell v. New York City Department of Social Services*, 436 U.S. 658 (1978). According to the respondent, *Monell* limits municipal liability to only those policies controlled or adopted by "a single governing board that controls [the municipality's] operations and either sets its policies or delegates that function to the officers." Resp. Br. 23. From this extremely restrictive view of municipal liability, which this Court has expressly rejected, the respondent argues that the county commission has no

authority or control over the sheriff and consequently that there can be no county liability in this case.

Contrary to the respondent's argument, this Court has recognized that government officials other than legislative bodies can be final local governmental policymakers.

> [I]t is when execution of a government's policy or custom, *whether* made by its lawmakers *or* by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983.

Monell, 436 U.S. at 694 (emphasis added). As this Court made clear in *Pembaur v. Cincinnati*, 475 U.S. 469 (1986):

> [T]he power to establish policy is no more the exclusive province of the legislature at the local level than at the state or national level. Monell's language makes clear that it expressly envisioned other officials "whose acts or edicts may fairly be said to represent official policy," and whose decisions therefore may give rise to municipal liability under § 1983.
>
> Indeed, any other conclusion would be inconsistent with the principles underlying § 1983 authority.

Id. at 480 (citation omitted).[1]

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[1] The federal district court in *Pembaur* initially dismissed the county as a defendant by adopting the same rationale respondent proffers here – that the "Hamilton County Board of County Commissioners, acting on behalf of the county, simply does not establish or control the policies of the Hamilton

A. The County Commission's Absence of Control Over the Sheriff is Not Relevant.

The respondent's argument is rooted in its contention that Alabama county sheriffs are not "answerable *in any way* to county commissions." Resp. Br. 9; *see also* Jefferson County Amicus Br. 12-13. Regardless of whether this is factually correct, *see* Pet. Br. 16-19, § 1983 does not require a county commission to control a county official's conduct or policies to give rise to county liability. Elected executive officials often set governmental policy in areas in which they are subject to no legislative control or review. Just as a governor can set statewide executive policy on certain matters for which the state legislature has no oversight, or a mayor can set citywide policy on certain matters for which the city council has no oversight, a sheriff or a county tax assessor or a county coroner can set countywide policy on certain matters for which the county commission has no oversight.

For example, in Alabama the county tax assessor is elected by the county's voters and "in each of the several counties shall have the right and authority to assess all real estate . . . ." Ala. Code § 40-7-1 (1975). The "coroner for each county" is elected by the county's voters, Ala. Code § 11-5-1 (1975), and is discharged with "the general

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County Sheriff." *Pembaur*, 475 U.S. at 475 (quoting district court). However, this Court accepted the view as stated by the Sixth Circuit "that the County Board's lack of control over the Sheriff would not preclude county liability if 'the nature and duties of the Sheriff are such that his acts may fairly be said to represent the county's official policy with respect to the specific subject matter.' " *Id.* at 476 (quoting *Pembaur v. Cincinnati*, 746 F.2d 337, 340-341 (6th Cir. 1984)).

duty . . . to hold inquests." Ala. Code § 11-5-4 (1975). The county commission does not control or even supervise these functions. However, if a county tax assessor were to adopt an intentionally racially discriminatory policy of assessing taxes, or if the county coroner were to adopt a policy of refusing inquests for persons of a certain religious view, those unconstitutional policies could certainly be considered county policies even though the county commission has no oversight. Thus, governmental power is not the exclusive province of legislative bodies, and in some areas, elected executive officials speak for the government rather than legislative officials. This is why this Court has required that in determining whether liability under section 1983 exists, "the trial judge must identify those officials *or* governmental bodies who speak with final policymaking authority" for the municipality. *Jett v. Dallas Independent School Dist.*, 491 U.S. 701, 737 (1989).

In Alabama, the obligations of county government are dispersed to different entities and officials, all of whom may possess final policymaking authority in different areas. Yet, the respondent insists that only the unconstitutional policies of one of these entities, the county commission, generates county liability under § 1983. The respondent cannot explain what it is about the county commission that makes it the sole repository of county authority for the purposes of § 1983 liability when it is not the sole final policymaker for the county under Alabama law. Nor can the respondent explain why the final policies of the sheriff in law enforcement or the coroner or the tax assessor must somehow be subordinate to the county commission before the county can be liable.

B. *Monell* Does Not Require the Corporate Business Model of a Single Governing Board for Municipal Liability Purposes.

The respondent erroneously suggests that local governments are operated according to the typical corporate business model. According to the respondent, this Court's decision in *Monell* adopted a view of local government as being identical to corporate businesses. Resp. Br. 20-23. However, many local governments have a separation of powers between executive officials and legislative bodies, with executive officials setting policy in some areas and legislative officials in others. This Court has never held that governmental functions should be viewed through a corporate model or that legislative officials are the only officials who can ever set governmental policy for purposes of § 1983.

The specific portion of *Monell* which respondent cites to support its corporate model argument actually proves the contrary. The relevant point comes from *Monell's* discussion of the Dictionary Act, passed in 1871, shortly before the passage of what is now § 1983. Resp. Br. 21 (citing *Monell*, 436 U.S. at 687-89). As this Court stated in *Monell*, the Dictionary Act's definition of the word "person," which encompasses corporations *and* local governments, demonstrated that the subsequent use of "person" in § 1983 was also meant to include local governments. *Monell*, 436 U.S. at 688-689. However, this does not mean that municipalities operate with the same governing structure as typical business corporations. Instead, the Dictionary Act specifically drew a distinction between local governments and business corporations, stating "the

word 'person' may extend and be applied to bodies politic *and* corporate." *Monell*, 436 U.S. at 688 (quoting Act of Feb. 25, 1871, § 2, 16 Stat. 431) (emphasis added). Thus, nothing in the Dictionary Act or in *Monell* supports the respondent's contention that a local governmental structure must be viewed as a typical corporate business structure.[2]

The respondent incorrectly suggests that the petitioner's position is based upon a *respondeat superior* argument. As this Court established in *Pembaur*, "like other governmental entities, municipalities often spread policymaking authority among various officers and official bodies. As a result, particular officers may have authority to establish binding county policy respecting particular matters and to adjust that policy for the county in changing circumstances." *Pembaur*, 475 U.S. at 483. Municipal liability for actions ordered by such officers exercising their policymaking authority is not an application of respondeat superior. *Id.*

C. The Absence of "Home Rule" in Alabama Counties Does Not Preclude County Liability.

The respondent argues that because "Alabama counties do not have 'home rule' powers" and because the county commission does not pass criminal laws, the

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[2] This is particularly true here where state courts have held that in Alabama "a county is not a corporation and has no corporate entity." *Housing Authority of Birmingham District v. Morris*, 14 So. 2d 527, 535 (Ala. 1943); *see also Moore v. Walker County*, 185 So. 175, 177 (Ala. 1938) (while a county has corporate characteristics it is not a corporation).

county cannot be liable for unconstitutional policies in the law enforcement area. Resp. Br. 11-12; *see also* Nat'l Assoc. of Counties Amicus Br. 16. The respondent concedes that Alabama law does confer on county sheriffs law enforcement authority but again contends that because the sheriff's authority is distinct from the county commission's authority, it must necessarily be distinct from the county. However, as petitioner argues in his opening brief, sheriffs in Alabama *are* the county officials with law enforcement authority. The sheriff's policymaking authority for the county is in no way dependent on similar law enforcement authority existing within the county commission or any other county official.

The absence of "home rule" in the county and the county commission's inability to pass criminal laws are simply not relevant. Even if the county commission had the authority to pass criminal ordinances, that "home rule" authority would not limit county liability under § 1983 to the enforcement of only those locally created ordinances.[3] When state or county law enforcement

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[3] By repeatedly limiting county authority and policy to only the authority and policy the county commission adopts or enacts, the respondent continually confuses the county with the county commission. For example, in the context of alcohol related crimes, *counties* in Alabama, not *county commissions*, determine whether the county shall be "dry." That is, county residents vote on whether the county will permit the sale and distribution of alcoholic beverages. Ala. Code § 28-2A-1 (1975). If the county elects to be a "dry" county, as Monroe County has, 1973 Ala. Act No. 564, then the sale, transport and distribution of alcoholic beverages becomes illegal. Ala. Code § 28-2-1(b) (1975).

agents happen to enforce federal rather than state criminal laws by arresting someone who violates federal law, they are nevertheless state or local policymakers for purposes of § 1983. That is, a municipality can have a variety of law enforcement policies that are unconstitutional and which create county liability under § 1983 even though the county commission did not enact the criminal laws that are being enforced.

In many states where federal courts have found that sheriffs are county final policymakers, state law similarly does not delegate law enforcement power to county commissions. Rather, like Alabama, the sheriff is the county's law enforcement official and county commissioners do not have any authority to make and enforce criminal laws.[4]

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[4] *Compare Turner v. Upton County, Texas*, 915 F.2d 133, 136-37 (5th Cir. 1990) (Texas county liable for sheriff who completely controls county law enforcement and is accountable to county voters), *cert. denied*, 498 U.S. 1069 (1991) *with* Tex. Local Gov't. Code § 81.028 (1997) (Texas county commissioners have no law enforcement authority); *compare Marchese v. Lucas*, 758 F.2d 181, 188-89 (6th Cir. 1985) (Michigan county liable for sheriff who is elected by county voters and is funded by county), *cert. denied sub nom. County of Wayne v. Marchese*, 480 U.S. 916 (1987) *with* Mich. Stat. Ann. § 5.283 (1996) (Michigan county commissioners have no law enforcement authority); *compare Blackburn v. Snow*, 771 F.2d 556, 571 (1st Cir. 1985) *with* Mass. Ann. Laws ch. 34, § 14 (1996) (Massachusetts county commissioners have no law enforcement authority); *compare Dotson v. Chester*, 937 F.2d 920, 925-32 (4th Cir. 1991) (Maryland county liable for sheriff even though under relevant state law sheriff is considered state officer for purposes of state tort liability) *with* Md. Ann. Code art. 25, § 1 (1996) (Maryland county commissioners have no law enforcement authority).

The respondent asks this Court to adopt an extremely restrictive approach to municipal liability that this Court has previously rejected and that is fundamentally at odds with *Monell* and its progeny.

II. WHERE COUNTY RESIDENTS ELECT THE COUNTY SHERIFF, WHERE THE COUNTY TREASURY FUNDS AND EQUIPS THE SHERIFF, AND WHERE THE SHERIFF'S LAW ENFORCEMENT AUTHORITY IS LIMITED TO THE JURISDICTION OF THE COUNTY, THE SHERIFF IS A FINAL POLICYMAKER FOR THE COUNTY RATHER THAN THE STATE.

The respondent asserts that county sheriffs in Alabama are state officials who cannot create a basis for county liability under § 1983. The respondent's assertion that Alabama law "gives an explicit and unambiguous" designation to sheriffs as state officials, Resp. Br. 11, is simply not supported by a review of Alabama law. Pet. Br. 22-24. Moreover, even if the respondent were right, state designations do not control. In addition, the respondent places much emphasis on the fact that state courts in Alabama frequently assign no liability to counties for improper conduct by sheriffs under state law. Resp. Br. 13. However, as this Court recently recognized, where federal constitutional concerns are at issue, the determination of whether a local policymaker is a state or county official is "a question of federal law." *Regents v. Doe*, 65 U.S.L.W. 4129, 4130 n.5 (Feb. 19, 1997); *see also Howlett v. Rose*, 496 U.S. 356, 376-78 (1990) (holding that Florida law which granted immunity to municipal entities did not preclude § 1983 claim against county school

board); *Martinez v. California*, 444 U.S. 277, 284 (1980) (asserting that California statute which immunized parole decision makers did not control § 1983 claim against public employees).

The Eleventh Circuit conceded below that the sheriff's occasionally applied label as a state official in Alabama is insufficient to establish that the sheriff is a policymaker for the state rather than the county. *McMillian v. Johnson*, 88 F.3d 1573, 1580 (11th Cir. 1996); Pet. App. 13a. This is particularly true where the basis for this label is the ambiguous inclusion of a "sheriff for each county" in the Alabama Constitution provision which lists members of the state executive department. Ala. Const. art V, § 112 (1901). The respondent attempts to buttress this contention by arguing that the sheriff works "for other state officials" by assisting the state judicial system, operating the county jail and enforcing state law in their county. Resp. Br. 13.

However, the fact that county sheriffs in Alabama serve process for state judicial courts or enforce state laws in their counties by no means establishes that sheriffs are not policymakers for the county. Municipal officials frequently work with state agencies and government officials as part of their duties, but this does not alter their final policymaking authority for their municipality. Alabama law dictates that "[i]t shall be the duty of sheriffs in their respective counties, by themselves or deputies, to ferret out crime, to apprehend and arrest criminals and, insofar as within their power, to secure evidence of crimes *in their counties*. . . . " Ala. Code § 36-22-3(4) (1975) (emphasis added); Pet. App. 82a. The fact that many of the criminal statutes enforced by county sheriffs are state

statutes is simply an insufficient basis to make the sheriff a policymaker for the state rather than the county. Rather, the sheriff is a county officer because county residents elect the sheriff, the county treasury funds and equips the sheriff, and the sheriff has final policymaking authority within but not outside the county.[5]

The respondent additionally argues that sheriffs are policymakers for the state rather than the county because sheriffs are subject to impeachment by state officials. However, Alabama law expressly authorizes state impeachment against all county and municipal officials including sheriffs, county treasurers, tax assessors, coroners "and all other county officers and mayors and intendants of incorporated cities and towns in this state." Ala. Code § 36-11-1 (1975).

Moreover, impeachment is a very rare event. *See Parker v. Amerson*, 519 So. 2d 442, 444 n.1 (Ala. 1987) (citing only three cases dealing with impeachment of sheriffs). Much more relevant are the people who have the power to choose the sheriff at each regular election, and to turn out an incumbent candidate if he or she is not performing satisfactorily – the voters of each county. The role of the county voters is vastly more important in controlling the activities of the sheriff and in determining who serves and does not serve than the role of state officials on those

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[5] The respondent's argument that the sheriff's operation of the county jail proves that the sheriff is a policymaker for the state, Resp. Br. 13-14, actually proves the contrary. As the Eleventh Circuit has held, the sheriff's operation of the county jail is a county function for which counties are liable under § 1983. *Parker v. Williams*, 862 F.2d 1471 (11th Cir. 1989).

extremely infrequent occasions when impeachment is attempted. *See City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 269 (1981) (compensatory damages awarded against a local government under § 1983 "may themselves induce the public to vote the wrongdoers out of office").

Additionally, while no relationship between the sheriff and the county commission is necessary for county liability purposes under § 1983, there is, in fact, a very clear relationship in Alabama between the county commission and other county officials with the county sheriff. As discussed in petitioner's opening brief, Pet. Br. 14-19, the county commission finances all law enforcement programs, furnishes and equips all operations by the sheriff, establishes budgetary appropriations regarding the sheriff's staffing, training, equipment and overtime pay and may regulate and determine the classification and rank of deputy sheriffs. The county coroner additionally must exercise the sheriff's law enforcement authority when the sheriff cannot discharge his or her duties. *See* Ala. Code § 11-5-5 (1975); *see also* Ala. Code § 15-4-9 (1975).[6]

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[6] At the end of its brief, the respondent attempts to limit the impact of *Pembaur* in this case by alleging various distinctions between Ohio and Alabama law. Resp. Br. 32-35. It should be noted that the points of distinction raised by the respondent were not relied upon by the Sixth Circuit in finding the county liable for the Ohio sheriff's conduct. The respondent's primary assertion that the sheriff is a county officer in Ohio, Resp. Br. 32, is based on references in Ohio law to the sheriff as a county officer that can similarly be found with regard to an Alabama sheriff under state law. *See* Pet. Br. 22-24. The respondent's additional argument that the Ohio sheriff is under the control of the county prosecutor, Resp. Br. 35, further illuminates the error of their initial argument that county liability exists only where a sheriff is under the control of the county commission. *See supra*.

CONCLUSION

There is no requirement under *Monell* or its progeny that a county sheriff's law enforcement authority be controlled or regulated by some local governing board before there can be county liability under § 1983. The respondent's argument that the sheriff is sometimes labeled a state officer and maintains a working relationship with other state officials or the state judicial system does not alter the sheriff's status and functioning as a final policymaker for the county. Consequently, where the county sheriff exercises final policymaking authority for the county in the area of law enforcement in an unconstitutional manner the county may be liable under § 1983. The Eleventh Circuit's contrary ruling in this case is thus in error and should be reversed and vacated by this Court.

Respectfully submitted,

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